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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

MOTION OF RAILROAD APPELLEES TO AFFIRM

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MOTION OF RAILROAD APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in Appendix A hereto move that this Court affirm the judgment of the District Court on the ground that the judgment is so clearly correct that plenary review of this Court is not warranted.

QUESTIONS PRESENTED

These appellees believe that the questions presented are the following:

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. 310a(a) to grant temporary authority where neither of the two conditions imposed by the statute has been shown to exist, especially where the sole supporting shipper acknowledges there is already sufficient and satisfactory service?

2. Does the Interstate Commerce Commission have the power to grant an application for temporary authority where admittedly the minimum standards of proof required by its own rules and regulations implementing 49 U.S.C. 310a(a) have not been met?

3. Did the Interstate Commerce Commission have authority to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being judicially reviewed without obtaining leave of the court, especially where the Commission's opposed motion for stay was never called up for hearing?

STATEMENT

The Opinion of the District Court furnishes a concise, complete and accurate statement of the case. See AFL J.S. 2a-8a. These appellees hereby adopt it.

The Statements of appellants in some particulars go beyond the record and in others fail to give full details. Also, significant facts are ignored.

The asserted agrarian background of American Farm

Lines was not developed on the record.[1] Nevertheless, it is here claimed that the government traffic is incidental and necessary to the transportation of member traffic and is essential to sustain the farm-related function. It is further urged that American Farm Line's existence as an agricultural cooperative carrier was threatened by the impending loss of the government hauling by reason of the amendment to the agricultural cooperative partial exemption, 49 U.S.C. 303(b)(5), and of two injunctions issued by the District Court for the Western District of Oklahoma. If these alleged facts have any place in this appeal, they should be considered in the light of those which follow.

As shown in Appendices B and C hereto,[2] American Farm Lines and its general manager have been held to be in contemptuous violation of that court's orders. Appellant Interstate Commerce Commission, interestingly enough, participated as an intervening plaintiff in each proceeding, successfully moving for summary judgment in one. In the contempt proceeding the court found, among other things:

1. In a substantial number of instances, American Farm Lines' handling of government traffic was not incidental and necessary to its farm-related transportation, even under the tests laid down in the *Northwest* case;[3]

---

[1] Until American Farm Lines applied to the District Court for stay of its order pending appeal, there was no suggestion that it intended to assume common carrier status and at the same time, with the same equipment, operate under the agricultural cooperative exemption. The questionable legality of such a proposal thus was not at issue.

[2] Findings of Fact and Conclusions of Law, filed July 24, 1969, and Judgment filed July 31, 1969 respectively, in *Munitions Carriers Conference, et al.* v. *American Farm Lines, et al.*, Civil Nos. 67-487 and 68-148 in the United States District Court for the Western District of Oklahoma.

[3] *Northwest Agricultural Cooperative Ass'n.* v. *I.C.C.*, 350 F.2d 252 (1965), *cert. denied*, 382 U.S. 1011 (1966).

2. Government, not cooperative membership hauling, is its first concern;

3. Westbound government shipments are unlawful and in contravention of the court's orders in that the involved vehicles were not proceeding westward to pick up farm-related loads;

4. In its attempt to circumvent the letter of the injunctions, American Farm Lines hauls grain for a member at a rate which realizes only half of its out-of-pocket operating costs. Further, its eastbound member traffic realizes only from 19 to 26 cents while its operating costs approximate 45 cents per mile;

5. During an involved two-month period, American Farm Line's government revenues were 72.3% of total revenues. In a ten-month period (during the last five months of which American Farm Lines was under one or both injunctions) its membership traffic remained constant while government traffic and equipment supply about trebled;

6. In spite of American Farm Line's protestations that its biggest problem is lack of equipment for west coast members, it dispatches eastbound government loads from the west coast. Further, it often bypasses California members with empty equipment on the way to pick up government loads; and,

7. American Farm Lines is in the general trucking business for the government beyond the limit allowed by law.

The two injunctions have been sustained by the United States Court of Appeals, Tenth Circuit. See Opinion filed July 30, 1969 in *Munitions Carriers Conference, Inc., et al.*

v. *American Farm Lines,* Nos. 10177 and 10178, attached hereto as Appendix D.

The above facts would seem to refute American Farm Lines' premise (AFL J.S. 16) that a practical effect of the lower court's judgment is to frustrate its efforts to *continue* to provide *lawful service* for nonmembers.

Alleged overwhelming evidence of *immediate and urgent need* of the proposed service is stressed in appellants' Statements. But, this Court was not informed that the sole supporting shipper advised American Farm Lines[4] that

> "• • • In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines."

Further, neither Statement makes mention of the unchallenged findings of the District Court (1) that the Interstate Commerce Commission in both its answer and brief conceded that its order of September 3, 1968 "may not have been based upon evidence to support" its conclusion, (2) that the administrative finality of that order was unchallenged, (3) that the Commission, by its order of October 9, 1968 recognized the stay order of the lower court, and (4) that it did not call up its opposed motion requesting stay of the lower court's temporary restraining order.

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[4] See Exhibit C to Complaint to Set Aside and Annul an Order of the Interstate Commerce Commission filed in the lower court on September 26, 1968, attached hereto as Appendix E.

ARGUMENT

The District Court decided this case on three alternative grounds.

1. The Interstate Commerce Commission has neither power nor discretion to grant a temporary authority application in the absence of a showing that both conditions specified in 49 U.S.C. 310a(a) exist;

2. The Interstate Commerce Commission may not grant a temporary authority application unless compliance is made with its rules and regulations set forth in *Ex Parte No. MC-67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, 49 C.F.R. 1131, et seq. governing the filing, processing and determination of such applications and prescribing minimum evidentiary and procedural standards.

3. The Interstate Commerce Commission had no authority, even under its own rules of procedure, to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being reviewed by the District Court without obtaining leave of the court to do so, especially in view of the fact that the Interstate Commerce Commission's motion for stay, which was opposed, was never called up.

While these appellees firmly believe that the District Court's alternative ground herein numbered 3 is legally and factually correct, they here, without waiving the point, take the position that its resolution is unnecessary. For, whether considered separately or together, the initial supporting Statement (underlying the order which the Commission concedes "may not have been based upon evidence to support its conclusions") and the Caputo statement fail to satisfy either of the two conditions imposed by the underlying statute and further fail to satisfy many of the Commission's minimum standards of proof necessary for a grant of authority.

1. The Purported Support Of The Application Fails To Satisfy Either Of The Two Conditions Imposed By The Statute.

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), provides that the Interstate Commerce Commission, in its discretion, may grant temporary authority to enable the provision of service when both of two conditions are shown to exist. First, there must be an immediate and urgent need for service, and second, the point or points involved must be without carrier service capable of meeting such need.

The broad discretionary powers relied upon so heavily by appellants do not exist, for neither of the two statutory conditions has been satisfied.

The supporting statements emphasize again and again the shipper's desire to have one single-line, irregular-route, complete-service, trucker to operate between every conceivable set of points in two exceedingly large areas. This type of service is felt to be preferable to that collectively provided by the numerous existing carriers.

It should be borne in mind that the original act to regulate motor carriers made no provision for issuance of temporary authority, and that 49 U.S.C. 310a(a) was enacted pursuant to the Interstate Commerce Commission's request to Congress for authority to deal with emergency situations. In a letter to both houses on February 25, 1938, the Commission's chairman requested authority (Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3), "to grant temporary operating to meet an emergency" because:

> "Cases arise, and have been brought to our attention, where *urgent need* for interstate motor carrier service *suddenly develops.* The *bringing in of oil wells in a new field* and conditions created by a flood or other *calamitous visitation* are good examples, and there are others." (Emphasis added)

Desire and preference for a complete, single-line service, is one thing. A sudden emergency need of it is another.

Neither supporting statement in the instant proceeding gives more than general conclusions. Both lack specifics. The Interstate Commerce Commission has often held that even as to applications for *permanent* authority general, unspecific statements of supporting shippers expressing a preference for single-line service are insufficient to establish need. In *Hancock Trucking, Inc., Extension Gulf and West Coast Routes,* 62 M.C.C. 513 (1954) the entire Commission said at Page 535:

> "**** We recognize, of course, that any single-line motor service between distant points has a number of potential advantages and fewer operational problems than interchange service as it now exists between the same points. In fact, the support of some of applicant's shipper witnesses is based largely on the single proposition that, to the disregard of other considerations, the advantages of single-line service should be made available to them. To the extent that this one factor dominates their support, we need comment no further than to say that the national transportation policy does not tolerate the thought that all shippers and all points are entitled to single-line motor-carrier service."

In a recent case, the Commission's Division 1 denied twenty-two applications principally on the ground that the *desired* single-line service had not shown to be *needed.* In *Cushman Motor Delivery Company, Extension, Iron and Steel,* 106 M.C.C. 809 (1968). Division 1 reaffirmed the principle that inter-line service is not bad *per se.* The Division stated at page 809:

> "**** The general statement of shippers are unconvincing that the presently used interline services result in unreasonable delays that warrant the granting of the authority sought. Interline service between two, or

> even among three carriers particularly to distant points in Wisconsin and the Upper Peninsula cannot be said to be inadequate *per se. Ayer* v. *United States,* 139 F. Supp. 440 (1956) and *Colorado-Arizona-California Express* v. *United States,* 224 F. Supp. 894 (1963). ***"

As its language makes clear, 49 U.S.C. 310a(a) was enacted to *enable the provision of service.* There must be an *immediate* need for the provision of service, and an *urgent* need for the provision of service. The point or points involved must be without carrier service capable of meeting such immediate or urgent need.

Admittedly, there is a lot of service in the involved territories. And, while the Department of Defense frankly advised American Farm Lines that its service is *desirable,* it cannot be said that there would be *insufficient* or *inadequate* service without it. The Department, as above shown, stated:

> *** In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines."

The application concededly was not supported to enable the provision of service. Service—sufficient service, adequate service—is already there. There can be no immediate or urgent need of service when the existing transportation system admittedly is sufficient and adequate. Accordingly, the lower court made the following finding (AFL J.S. 6a) which remains *unchallenged*:

> "*** The ICC also had before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position

> to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide."

American Farm Lines and its supporter wholly failed to establish that the two statutory conditions exist. Thus, the Commission had no discretion in the matter. Its purported grant was a nullity and the court clearly was correct in so holding.

2. The Purported Support Of The Application Fails To Satisfy The Commission's Rules Prescribing Minimum Evidentiary And Procedural Standards.

Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle, which applies to the Interstate Commerce Commission, holds even when the considered administrative action is discretionary in nature. *Service* v. *Dulles*, 354 U.S. 363; U.S. ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260. *Atwood's Transport Lines* v. *U.S.*, 211 F. Supp. 168, 170, affirmed per cur., 373 U.S. 377, is a case involving the validity of a rule of the Interstate Commerce Commission applicable to motor carriers of passengers. It was there held:

> "Rules and regulations promulgated by by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to the same tests as statutes. ***"

Under the authority of 49 U.S.C. 204(a)(6), the Interstate Commerce Commission adopted temporary authority rules and regulations effective July 5, 1965. *Ex Parte No. MC-67, Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 49 C.F.R. 1131 et seq.

Appellants make no claim that the purported support of the application satisfies the standards and minimum

requirements prescribed in those rules. Rather, they urge that they are merely guidelines to facilitate consideration, that literal compliance is not required, that here compliance would amount to a useless act, that the Commission cannot make rules which reduce or relinquish its statutory duties, and, that in any event, its broad discretionary powers give it full leeway.

Those contentions have been renounced by the Commission itself.

At Page 39 of the *Seventy-ninth Annual Report of the Interstate Commerce Commission,* it was stated:

> "*** The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards of proof necessary for a grant of authority.* ***" (Emphasis added)

The avowed purpose of the rule-making proceeding was to determine whether rules should be prescribed to *govern* the filing, processing and determination of applications. 98 M.C.C. at 483. Rule 240.2(c), at page 486, provides that applicants *must* be accompanied by a supporting statement, *must* be signed, *must* contain a certification of its accuracy, and *must* contain *at least* the information elicited in subparagraphs (1)-(11).

On July 23, 1968 the Commission issued a policy release[5] in which it was stated:

> "Requests for temporary authority to conduct regulated motor carrier service will be *turned down* if the applications do not adequately comply with Interstate Commerce Commission rules. * * *"

* * *

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[5] See footnote 4 to *Acme Cartage Co.* v. *U. S.*, 290 F. Supp. 453.

> "Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in *Ex Parte No. MC 67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, and 49 CFR 1131 (formerly 49 CFR 340). * * *" (Emphasis supplied.)

In its report to Congress, in its rules, and in its policy statement, appellant Interstate Commerce Commission has made it clear that its implementing rules set forth minimum standards of proof which must be observed.

The Commission is authorized by law to promulgate implementing rules. It did so in the manner and form required by the Administrative Procedure Act. The adopted rules have the same force and effect, and are subject to the same tests, as statutes. In part, they provide (emphasis added):

> "240.2(c) *Supporting statements.*—Each application for temporary authority *must* be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense *must* contain a certification of its accuracy and *must* be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any

such supporting statement *must* contain *at least* the following information:

• • •

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

• • •

"240.4(b)(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist *only* where it is established that there is or soon will be an *immediate* transportation need which *reasonably* cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, *failure of existing carriers to provide service,* or comparable situations which *require* new motor carrier service before an application for permanent authority can be filed and processed.

• • •

"240.4(b)(4) *Single-line* service.—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service *will not warant* a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized *only* when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

• • •

240.4(b)(6) *Failure to provide equipment.*—Temporary authority may be granted where existing author-

> ized carriers *are unable or refuse to furnish equipment* necessary to move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need."

Neither the supporting statements nor any other part of the record gives the *minimum* information which *must* be supplied. As example, it is conceded that the requirements of (8) and (9) above were ignored. The record contains only generalizations and conclusions. The lack of required specificity deprived appellees of due process, for they were not informed where, why, or when they allegedly failed or refused to serve. The allegation that appellees have not been prejudiced by the wanton disregard of the rules is untrue.

Further, it is clear that the Interstate Commerce Commission ignored its own standards governing determination of applications.

In its implementing rules, the Commission has interpreted the statutory condition "immediate and urgent" consistently with the plain language of the pertinent statute and its legislative history. The desires and preferences of the Department of Defense do not constitute a suddenly developed immediate and urgent need as contemplated either by the statute or the rules. No urgency or emergency is claimed. It is not enough to say that it would be a useless act to supply required information because it is well known that no one carrier is authorized to give the complete, single-line service desired, for, as seen, neither the National Transportation Policy, the underlying statute, nor the rules contemplates such a service. As in the case of permanent authority applications, the mere desire for single-line service fails sufficiently to support temporary applications. Moreover, there is no allegation that existing

authorized carriers are unable to furnish or refuse to furnish equipment.

That the Commission's standards for determination have been flouted is made doubly clear by the shipper's admission that the existing authorized carriers render sufficient and adequate service.

Appellants rely upon three decisions to support their contentions that the rules may be disregarded. In *Roadway*[6] no question relating to the rules was raised before the Commission, and the reviewing court deemed the point to be waived. In *Estes*,[7] the decision in *Acme Cartage Co. v. U.S.*, 290 F. Supp. 453, which was relied upon in great measure by the lower court in the instant proceeding, was distinguished on the facts. In *Superior*,[8] both *Acme* and the instant case were distinguished on the facts. These cases do not help appellants.

The rules have the force and effect, and are subject to the same tests, as statutes. They are not mere guidelines. As shown, literal compliance is not a useless act. This is especially true where, as here, appellees have been prejudiced by noncompliance. The Commission's suggestion in its Jurisdictional Statement that it may have reduced or relinquished its statutory duties by adopting the involved rules does not square with the language of the controlling statute, its legislative history, the Commission's report to Congress, its policy release, or its order enacting the rules.

The lower court's holding that the Commission erred in disregarding and violating its governing rules and regulations clearly is correct.

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[6] *Roadway Express, Inc.* v. *U.S.*, 263 F. Supp. 154.

[7] *Estes Express Lines* v. *U.S.* 292 F. Supp. 842, affirmed per cur., 392 U.S. 718.

[8] *Superior Trucking Co.* v. *U.S.*, 1969 CCH Fed. Car. Cas. ¶ 82108.

CONCLUSION

The two supporting statements, whether considered singly or in concert, fail to satisfy (1) either of the two conditions imposed by 49 U.S.C. 310a(a), or (2) the implementing rules and regulations. It is thus beside the point whether the Commission had the power to issue the purpoted second order.

Respectfully submitted,

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August, 1969

CERTIFICATE OF SERVICE

I, Ed White, a member of the Bar of this Court, hereby certify that copies of the foregoing Motion of Railroad Appellees to Affirm has been served by me this 21st day of August, 1969 on all parties required to be served by mailing copies thereof by air mail, postage prepaid as follows:

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APPENDIX A

NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington and Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines and Southern Railway Company
Fort Worth and Denver Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Northern Pacific Railway
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
The Texas and Pacific Railway Company
Toledo, Peoria and Western Railroad Company
Union Pacific Railroad
Waterloo Railroad

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Filed July 24, 1969, Vera L. Howard, Clerk, U.S. District Court, by Zeta M. Cowan, Deputy.

MUNITIONS CARRIERS CONFERENCE, INC.;
CONSOLIDATED FREIGHTWAYS;
PACIFIC INTERMOUNTAIN EXPRESS;
RISS & COMPANY, INC.;
TRI-STATE MOTOR TRANSIT COMPANY;
ILLINOIS CALIFORNIA EXPRESS, INC.;
RINGSBY TRUCK LINES, INC., and
IML FREIGHT, INC.,
Plaintiffs,

vs.

AMERICAN FARM LINES,
a Cooperative Marketing Association;
HOWARD McCORMACK and
E. E. STROHFIELD,
Defendants,

INTERSTATE COMMERCE COMMISSION
Inv. Plaintiff.

Civil No. 68-148

* * *

Grey W. Satterfield of the firm Franklin, Harmon & Satterfield, Oklahoma City, Oklahoma, for Plaintiffs

Harry F. Horak and J. F. Walker, Interstate Commerce Commission, Ft. Worth, Texas, and Bernard A. Gould, Interstate Commerce Commission, Washington, D. C., for Intervening Plaintiff

James M. Robinson and William L. Peterson, Jr., of the firm Hanson, Fisher, Tumilty, Peterson & Tompkins, Oklahoma City, Okla., for Defendants

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before, LUTHER B. EUBANKS, United States District Judge

FINDINGS OF FACT

The plaintiffs herein filed on April 9, 1969, a Petition for an order to show cause why disobedient parties should not be punished for civil contempt with respect to the permanent injunction entered in this cause on May 28, 1968. An order to show cause was entered hereon on April 9, 1969, and duly served upon each of the defendants.

Hearing was held before the Court on May 26 through May 29, 1969, at Oklahoma City, Oklahoma, with the plaintiffs appearing by their attorneys, Ben Franklin and Grey W. Satterfield, defendants by their attorneys, James M. Robinson, William L. Peterson, Jr., and Raymond E. Tompkins, and the intervenor by its attorney, Harry F. Horak. The Court, in reaching its conclusions, has considered the pleadings, evidence, stipulations, and arguments of counsel.

The pertinent ordering portion of the permanent injunction of May 28, 1968, reads as follows:

> It is further ordered, adjudged and decreed that Plaintiffs' Motion for Summary Judgment should be, and the same is hereby sustained and that defendants, American Farm Lines, Howard McCormack, and E. E. Strohfield, and defendants' other officers, agents, employees and representatives should be, and the same are hereby permanently enjoined from the for-hire transportation in interstate or foreign commerce of any products other than those products mentioned in Section 1141j of Title 12 U.S. Code, except under one of the following circumstances:
>
> (a) When proceeding to pick up and transport a shipment of products contemplated by Section 1141j of Title 12, U.S. Code when necessary to prevent proceeding with an empty vehicle movement.
>
> (b) When returning from the delivery of a shipment of products contemplated by Section 1141j of Title 12,

U.S. Code when necessary to prevent an empty vehicle movement.

Said injunction shall remain in full force and effect until such time, if at all, as there is in force with respect to said defendants, appropriate authority from the Interstate Commerce Commission authorizing them to engage in such operations.

A companion cause with the same parties was determined by this Court in No. 67-487 Civil, and the record therein was incorporated in the instant action in No. 68-148 Civil.

Oral and documentary evidence was adduced. Six different types of motor transportation by defendant American Farm Lines in interstate commerce were outlined and described by the plaintiffs in their evidence as being in contravention of the above-quoted injunction. Contra evidence and exhibits were proffered by the defendants to show compliance therewith. Each type of operation will be discussed in this opinion.

The first deals with operations termed by the plaintiffs as "long layover" counts and are represented by Exhibits 28 through 48. Generally, these involve a westbound shipment of explosives moving on a Government bill of lading and an eastbound shipment of canned goods for a member of American Farm Lines. For example, in Exhibit 33, a Government shipment of explosives was transported from Crane, Indiana, to Bangor, Washington, arriving at the latter point at midnight on November 19, 1968. The vehicles, Tractor 627 and Trailer V773, and driver laid over at Bangor for unloading for 157½ hours until November 26. The same vehicles and driver then deadheaded empty for 885 miles to Modesto, California, where they again laid over, awaiting a member load, for 174½ hours until December 4 before proceeding eastward to Omaha, Nebraska.

Another example is Exhibit 29 wherein a Government explosive load was transported from Oklahoma City, Oklahoma, to Concord, California, where it laid over 79 hours, then deadheaded empty for 80 miles to Stockton, California, where another layover of 64 hours occurred and then a member shipment was transported to Oklahoma City. This round trip was made in the period from November 17 to 27, 1968. It is plaintiffs' contention that these layovers evidence a violation of the injunction because defendant American Farm Lines could not have been proceeding westbound with the Government shipment with the intention to pick up and transport a specific member shipment on the west coast. Defendants' evidence and exhibits indicate that most of these layovers occurred about and during the Thanksgiving weekend when its members' plants were closed. It appears, however, from the testimony of Don Landrum, dispatcher for American at Oklahoma City, that the westbound Government loads are not dispatched for the purpose of picking up specific member loads on the west coast. His testimony was that the vehicle transporting the westbound Government load is not available for further dispatch until the Government shipment is unloaded. The Court concludes that the westbound shipments on Government bills of lading are unlawful and in contravention of the injunction of this Court because the vehicles were not proceeding to pick up and transport a shipment of products contemplated by the injunction and Section 1141j of Title 12, U.S. Code. In addition, the Court is of the opinion that the Government shipments to Bangor, Washington, as described in Exhibit 33, are unlawful and in violation of the injunction for the further reason, as defendants well knew, that it was never contemplated by this Court that the defendants could carry Government freight ostensibly on a trip to pick up a member load when the member load was 800 miles away from

the destination of the Government freight. Other instances of similar Government shipments to Bangor and eastbound member shipments from the California Bay area are reflected in Exhibits 7, 28, 33, 34, 36, 37, 40, 41, 42, 45, 47, D1-21-A, D1-25-A, D1-26-A, D1-27-A, D3-4-B, D3-12-B, D3-15-B, D3-16-A, D3-17-D, D3-18-A, and D3-18-C. Two additional round trips involving Government shipments to Bangor and member moves on return from California were testified to by Allen M. Crosby and David Loftin in their respective depositions.

The second type of transportation by defendant American Farm Lines are called "sandwich" moves by the plaintiffs. These are documented in Exhibits 2, 5, 7, 11, 12, and 49 through 55. Typical is Exhibit 2 wherein American transported Government traffic from Joliet, Illinois, to Hill Airforce Base, Utah, thence moved a load of grain from Nephi, Utah, to Brawley, California, for member Farmers Grain Cooperative, and thence a Government shipment from Norton Airforce Base, California, to Lake City, Missouri. Plaintiffs contend that this round trip constitutes, in fact, back-to-back movements of Government traffic within the purview of the injunction and that the sandwiched movement of grain is a subterfuge to defeat the prohibitions of the injunction. Defendants contend that it is a bona fide member movement with Farmers Grain Cooperative having become a member of American Farm Lines in July, 1968, and that it avoids the otherwise deadhead miles from Utah to California if it did not have this haul. The Court finds with respect to the round trip in Exhibit 2, discussed above, that the Government haul from Joliet to Hill Airforce Base produced transportation revenue of $1,817.47, the member grain haul from Utah to California brought in $150.00, and the Government haul from California to Missouri produced $694.00. Thus, on this round trip, Govern-

ment revenue totaled $2,511.47 whereas membership revenue was merely $150.00. From a mileage standpoint the grain haul from Nephi to Brawley was 833 miles. Deadhead empty miles because of this grain haul were 30 miles from Hill Airforce Base to Ogden, 280 miles from Brawley to Norton Airforce Base, for a total of 310 miles. Out-of-pocket expense per mile of operation was testified to be 45 cents. It was also testified that the deadhead miles from Utah to California without the grain haul was 808 miles. Mathematical computations thus indicate that the cost to American without the grain haul would have been $363.60, whereas the cost to it with the grain haul is $364.35. These figures will vary in each instance depending upon the origin and destination of the Government shipments, but the question arises—how does this grain haul benefit American other than to sandwich a member haul between two Government shipments on the same round trip? The next question is whether the Government hauls meet the necessary and incidental tests of *Northwest Agricultural Cooperative Association* vs. *Interstate Commerce Commission*, 350 F.2d 252, wherein it was stated:

> • • • on the uncontradicted facts Northwest's transportation of nonfarm products and supplies was incidental and necessary to its farm-related transportation both in *character* and *amount*—incidental because limited to otherwise empty trucks returning from hauling member farm products to market and producing a *small return* in proportion to Northwest's *income from trucking farm products* and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable. (Underscoring supplied)

The Court concludes that the Government hauls herein were not incidental and necessary to the grain haul. Defendants

have tendered evidence that the eastbound movement prior to the first Government shipment was a member shipment and that the westbound movement following the last Government haul was also a member shipment. However, defendant Howard McCormack, general manager of American, testified that a round trip commences with the westbound haul from the home base territory and ends with the eastbound haul back to that area. Hence, the round trip here begins and ends with the Government hauls. Defendants have introduced Exhibits 6B1 through 6B34 showing Government hauls to Hill Airforce Base, Utah, the grain haul from Utah to California, and then a member haul back to the Midwest. These appear to be proper and lawful as cooperative movements but the same cannot be concluded when this grain haul is sandwiched between two Government shipments. The Court concludes that in those instances when the round trip includes a Government haul, then a member grain haul as shown here, followed by another Government haul—all on the same round trip—the Government movements are unlawful, are not necessary and incidental to the member grain haul, are not exempt under Title 49, Section 303(b)(5), U.S. Code, and are in violation of the provisions of the instant injunction.

Plaintiffs introduced evidence with respect to four other types of operations being performed by the defendants. These include so-called "bobtail" operations such as moving a Government shipment to Bangor, Washington, then dropping the loaded trailer and headheading the tractor back to Oklahoma City, pulling another empty trailer to Springfield, Missouri, and then moving a trailer with a Government shipment to Bangor, all as shown in Exhibit 26. The second operation involves the back-to-back movement of Government shipments by the same tractor but using different trailers, as shown in Exhibits 3, 4, 6, 8, 9, 10, and 15.

The third type is described as a "shuttle" operation where one tractor is used to pull empty and loaded trailers between shipping installations and the terminals of American at Oklahoma City or Springfield, Missouri, as shown in Exhibits 13, 14, 16, 17, 18, and 19. Since the entry of the injunctions herein and in the companion case, the defendants had adopted the practice of following the trailers in complying with the back-to-back prohibitions thereof. In other words, if a trailer moved a Government or nonmember shipment, its next shipment had to be a member haul. Records were kept upon this basis to assure compliance with the injunctions. Little or no attention was paid to the tractor in this respect. The Court is aware of the novelty of this point. The back-to-back prohibitions of these injunctions did not cover this point. Nor is the Court aware of any prior expressions on this point by the Commission or any court with regard to the incidental and necessary tests. The first official recognition of this issue was on May 7, 1969, when the Interstate Commerce Commission, intervenor herein, adopted rules and regulations in Ex Parte No. MC-75, *Implementation of Public Law* 90-433—*Agricultural Cooperative Transportation Exemption,* reported in 108 M.C.C. 799. One of the rules adopted to be known as 49 CFR 1047.21(a) reads as follows:

> (a) The phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative associations for nonmembers as described above is performed *with the same trucks or tractors* employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation, that it is not economically feasible to operate the *trucks or tractors* empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the

> additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable. (Underscoring supplied)

These regulations became effective on July 7, 1969. Under this regulation, cooperative associations or federations will be required to follow the tractor or truck rather than the trailer. Upon the basis of the record herein, the Court cannot conclude that the defendants are in deliberate violation of the injunction herein with respect to these three types of operations.

In the fourth instance defendants transported Government freight on trailer V-670 from Oakland, California to Oklahoma City thence to McAlester where it unloaded. This empty trailer was then pulled back to Oklahoma City and from there to Crane, Indiana where it was loaded with Government freight and then pulled to Bangor, Washington. These movements took place between October 31 and November 29 and involved four different tractors. At first blush these movements would seem to be a direct violation of both the letter and the spirit of the injunction. The defendants make a lame attempt to justify the operation by pointing out that a member load was delivered a San Francisco on this trailer immediately prior to the loading of Government freight at Oakland and that a member load was taken on at Hood River, Oregon, shortly after off-loading at Bangor so by attaching the two member loads to the front and back of the whole movement and treating the trips as separate and severed at either McAlester, Oklahoma City or Crane there would be no back-to-back trailer violation. While I cannot accept such contention I do excuse this movement as being inadvertent and unintentional. I am firmly convinced that defendants made a studied and diligent effort to avoid this particular type of back-to-back trailer movement so as

to appear to be in compliance with the letter of that part of my earlier comments in companion Case No. 67-487, to-wit:

> "The cooperative may, in my opinion, haul nonfarm, nonmember products for hire without an I.C.C. permit in returning from the delivery of member owned and produced products or may haul nonfarm, nonmember products for hire in going after a load of member owned and produced products and not transgress applicable statutes."

while simultaneously, completely and deliberately ignoring the spirit and the letter of the latter injunction order entered in the instant case which provides, as heretofore set out, that nonmember freight may be hauled only

> *"when necessary to prevent proceeding with an empty vehicle movement."*

Defendants contend the injunction is vague and indeed once sought clarification but I find the order is clear and understandable on the type of operations that are found to be in violation. Defendants are exonerated in the areas where there might be some ambiguity.

Many of the exhibits in evidence depict eastbound Government shipments transported by American from California points to the Midwest. Although not categorized among the six others these eastbound Government shipments are found illegal. Representatives of two members of American, namely, Taylor Merriman of Tri-Valley Growers and Mr. Loney of California Canners and Growers (Kal-Kan), testified to the overwhelming needs of their concerns for the eastbound transportation services of American. Mr. Loney averred that his firm could give a shipment to American whenever one of its vehicles made an appearance. This being true, it follows that American was unlawfully transporting the eastbound Government

shipments contrary to the injunction herein. The fallacy of defendants' argument contending for the lawfulness of these eastbound Government shipments is that the cooperative membership hauling has not been its first concern. Although defendant McCormack testified that membership shipments were given first consideration, the facts of record do not support his statement. Its Government hauling appears to be its first concern. The thrust of the involved statutes, case law on the subject, and the injunction herein is that the cooperative farm transportation must come first and the other transportation—nonmembership and Government—should be used to fill in to prevent an otherwise empty movement of the vehicle used in accomplishing the farm cooperative movement. In addition to the eastbound Government shipments in the above-discussed "sandwich" moves, others are shown in Exhibits 1, D3-2-A, D3-3-A, D3-4-A, D3-7-A, D3-8-A, D3-9-A, D3-10-A, D3-17-B, D3-17-C, D3-17-G, D3-17-H, and D3-17-I.

Despite defendants' claims that they have made a "positive effort" not to violate this Court's orders and that they do not "look for" non-member business and that such business is only used when their member business is in "imbalance", additional facts were developed by the evidence which, while not directly supportive of any of the six types of transportation movements complained of by plaintiffs, are demonstrative of the general devotion of defendants to their government traffic and their preferential handling of such over the traffic of their own members. Some of these facts are:

(a) The revenue derived by American Farm Lines from their government traffic for the slightly over two-month period in issue was $1,603,195.

(b) During the same approximate two-month period

72.3% of American Farm Lines' total revenue was from government traffic, 40.2% of its total tonnage was hauled for the government and 44.5% of its total trips during such time was also for the government.

(c) The original "back-to-back" injunction was issued by this Court on February 20, 1968, and the second injunction, necessary because of the method of operation adopted by defendants, was issued May 28, 1969. These orders have not discouraged defendants from their continued concentration on government hauling. For American Farm Lines' fiscal year October 1, 1966 through September 30, 1967, it did slightly over $1,400,000 worth of member business and nearly $1,300,000 worth of government business. For its fiscal year October 1, 1967 through July 31, 1968, (during the last five months of which it was under one or both of this Court's injunctions) its member business remained about the same at about $1,450,000, while its government business increased nearly three-fold to over $3,350,000. Also, on July 1, 1967, American Farm Lines had only 72 tractors and 77 trailers. By December 1, 1968, these had increased to 194 tractors and 279 trailers. Defendants' method of comparing their member and government traffic in terms of pounds carried is not valid because the factor of the length of the haul is not included. But even accepting these figures, the amount of American Farm Lines' government freight increased from 40 million pounds in 1967 to 108 million pounds in 1968, and the projection for 1969, based upon the first six months, will be 164 million pounds, if defendants are unrestricted in their operations.

(d) The per mile cost of transportation for American Farm Lines is approximately forty-five cents. A com-

putation from a number of defendants' exhibits covering member hauls from the west coast show the per mile revenue from these to be in the neighborhood of only nineteen to twenty-six cents. The president of American Farm Lines did not know if the membership freight hauls from the west coast paid for themselves. It is obvious that defendants' growth and increase in gross revenue has not come from their member business.

(e) Although defendants admit that their biggest continuous problem in handling membership business is not having sufficient equipment to meet the needs of their west coast members, American Farm Lines does dispatch government loads from the west coast. There are also many examples of American Farm Lines' equipment bypassing its California members with empty trailers, on its way to pick up government loads.

The Court further finds that plaintiffs, or some one of them, would have made the hauls herein found to be in violation of the injunction had not the defendants done so and that the defendants realized and plaintiffs lost profits of $43,650.39 by reason of the wrongful and contemptuous acts aforesaid.

The reasonable fee for plaintiffs' attorneys is found to be $30,000.00 and actual expenses incurred by these lawyers in connection with this proceeding are found to be $797.53.

CONCLUSIONS OF LAW

Defendants, and each of them except Strohfield, are in contemptuous violation of the express and necessarily implied terms of this Court's order.

The nature of defendants' operations and the fact that the bulk of their revenues are derived from government

transportation show that they are in the general trucking business for the United States Government beyond the limited exemptions allowed by law (49 U.S.C.A. §§ 303(b)(5); *Northwest Agricultural Cooperative* v. *ICC* 350 F.2d 252).

With respect to the "Long Layover" movements, the Court concludes that defendants were in contemptuous violation of its injunction because the government loads were not coordinated with a member's order for transportation and because in most instances after the delivery of the government freight, the vehicles in question were [illegible]0 to 1,000 miles away from the member they were [illegible] It was never the Court's intention to allow such diversion.

The "Sandwich Moves" are a subterfuge in an attempt to camouflage contemptuous hauling for the United States Government. The grain moves which defendants travel great distances to handle produced less than $150 per load —less than one-half their cost of transportation. There can be no rational economic justification for such conduct except to support prohibited government hauling. This is confirmed by the conduct of defendants in hauling government freight in an easterly direction from the west coast after delivery of the grain. (*Hoffman LaRoche, Inc.* v. *Schwegman Bros.* G.S., 122 F. Supp. 781; *Riss, et al.* v. *Murphy, et al.*, U.S.D.C. W.D. Okla. #68,222 and U.S.D.C. S.C. Iowa Civ. #8-2207-C-1).

All Government and nonmember freight moved by defendants from the west coast to and toward the Midwest and east during the time involved herein was done illegally and in direct and willful disobedience of the order of this Court because none of defendant's trips in such hauling were necessary to prevent an empty trailer movement.

The Court concludes that plaintiffs are entitled to damages as a result of the revenues diverted from them by

defendants' contemptuous violations of the Court's injunction in the amounts equal to defendants' net revenues from each item of transportation shown in these findings in the total amount of $43,650.39, and to their costs herein. (*Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448). The Court further concludes that these amounts accurately reflect the profit the plaintiff would have made from such carriage had defendants not diverted the revenues from plaintiffs. The Court further concludes that some of the plaintiffs would have transported all of said Government loads had not plaintiffs diverted them. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448. *Wheldon* v. *MGM*, 106 F.2d 45.

Plaintiffs are entitled to an attorney fee in the amount of $30,000, plus expenses in the amount of $797.53, to be paid by defendants.

Counsel for plaintiffs will submit an appropriate judgment. It being the firm and considered opinion of this Court that the contemptuous acts herein found to have been committed were caused and brought about primarily by the defendant, Howard McCormack, it is directed that, if possible, he personally pay the sums above stated and which will be recited in the judgment; however, and since he was at all times acting as the manager of American Farm Lines the judgment will run against both jointly and severally with the proviso that should plaintiffs be unable to satisfy the judgment as against McCormack resort may be had as against American Farm Lines for the whole or any remaining part. The judgment will further recite that American Farm Lines will, if it so requests, have judgment over as against McCormack for any part thereof that American Farm Lines be required to pay.

DATED this 24th day of July, 1969.

Luther B. Eubanks
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Filed July 31, 1969, Vera L. Howard, Clerk, U.S. District Court, by Zeta M. Cowan, Deputy.

MUNITIONS CARRIERS CONFERENCE, INC.;
CONSOLIDATED FREIGHTWAYS;
PACIFIC INTERMOUNTAIN EXPRESS;
RISS & COMPANY, INC.;
TRI-STATE MOTOR TRANSIT COMPANY;
ILLINOIS CALIFORNIA EXPRESS, INC.;
RINGSBY TRUCK LINES, INC., and
IML FREIGHT, INC.,
Plaintiffs,

vs.

AMERICAN FARM LINES, a Cooperative Marketing Association;
HOWARD McCORMACK and E. E. STROHFIELD,
Defendants,

INTERSTATE COMMERCE COMMISSION,
Intervenor.

Civil No. 68-148

JUDGMENT

The Court having filed with the Clerk of this Court, Findings of Fact and Conclusions of Law, concerning the show cause proceeding herein and filed for record herein on July 24, 1969, the Court makes the following judgment based thereon:

IT IS THE ORDER, JUDGMENT AND DECREE of the Court that defendants, Howard McCormack and American Farm Lines, are in contempt of the injunction entered herein on May 28, 1968, and judgment is hereby entered against each of them jointly and severally and in favor of plaintiffs in the amount of $43,650.39, plus an attorney fee in the amount of $30,000.00, and plus expenses in the amount of $797.53, with interest on the total sum of $74,447.92, at ten percent (10%) per annum from July 24, 1969, and for the costs of the action, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and it is hereby entered in favor of defendant, E. E. Strohfield, against plaintiffs on said show cause proceeding herein.

Dated this 31st day of July, 1969.

Luther B. Eubanks
United States District Judge

Judgment entered in Civil Docket on July 31, 1969, Adelaide Holston, Deputy.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed United States Court of Appeals, Tenth Circuit, July 30, 1969, William L. Whittaker, Clerk.

JULY TERM—1969

MUNITIONS CARRIERS CONFERENCE, INC.; CONSOLIDATED FREIGHTWAYS; PACIFIC INTERMOUNTAIN EXPRESS; RISS & COMPANY, INC.; TRI-STATE MOTOR TRANSIT COMPANY; ILLINOIS CALIFORNIA EXPRESS, INC.; RINGSBY TRUCK LINES, INC., and IML FREIGHT, INC., *Plaintiffs-Appellees,* vs. AMERICAN FARM LINES, a Cooperative Marketing Association; HOWARD McCORMACK and E. E. STROHFIELD, *Defendants-Appellants,* INTERSTATE COMMERCE COMMISSION, *Intervenor-Appellee.*	Civil Nos. 10177 & 10178

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(District Court No. 67-487 Civil)

James M. Robinson, Oklahoma City, Oklahoma, for appellants.

Grey W. Satterfield, Oklahoma City, Oklahoma, for appellees.

Harry F. Horak, Fort Worth, Texas (J. F. Walker, Fort Worth, Texas, and Bernard A. Gould, Washington, D.C., with him on the brief) for intervenor-appellee.

Before PHILLIPS, SETH, and HICKEY, Circuit Judges.

HICKEY, Circuit Judge.

This consolidated case comes to us on the appeal of three judgments entered by the United States District Court for the Western District of Oklahoma in two separate cases. Two judgments were entered in favor of appellees Munitions Carriers Conference, Inc., and several other motor carriers, enjoining appellants American Farm Lines, and two of its employees, from continuing certain carrier operations. The other judgment was entered in favor of the appellee Interstate Commerce Commission which intervened in each case.

Munitions Carriers is an association of motor carriers licensed to transport Classes A and B explosives under authority granted by the Interstate Commerce Commission,

an agency of the United States Government. The other appellees herein are motor carriers engaged in the same occupation.

American Farm Lines is a cooperative marketing association incorporated under the laws of the State of Oklahoma.

At the time of the initial action American Farm Lines was engaged in hauling government freight and Classes A and B explosives on government bills of lading in interstate commerce. American Farm Lines is authorized to transport farm to market and market to farm products for the use and benefit of its agrarian members.

The initial action was filed on December 8, 1967, and the resulting judgment permanently enjoined American Farm Lines, its General Manager, Howard McCormack, and its government division director, E. E. Strohfield, from transporting in interstate or foreign commerce as motor carriers over and upon the public highways for compensation, the following commodities: (1) Classes A or B explosives on government bills of lading in roundtrip (back-to-back) movements; (2) Classes A or B explosives on government bills of lading in connection with the transportation of other freight shipped on government bills of lading in roundtrip (back-to-back) movements; (3) freight shipped on government bills of lading in roundtrip (back-to-back) movements. The judgment proscribed these operations until such time as authorized by the I.C.C.

Approximately three months later the court granted the I.C.C.'s motion for summary judgment in the same case and permanently enjoined appellants from transporting explosives for the government in connection with the movement of non-exempt, non-member traffic in the reverse direction in interstate or foreign commerce for compensation unless authorized to do so by the I.C.C.

Thereafter, on April 16, 1968, the plaintiffs (appellees herein) and three additional motor carriers filed the succeeding action against the defendants (appellants herein). The I.C.C. again intervened. This action terminated in a summary judgment filed May 28, 1968, which enjoined American Farm Lines and their named employees from the for-hire transportation in interstate or foreign commerce of any products other than those products mentioned in 12 U.S.C. § 1141(j) except when proceeding outbound to pick up and transport market to farm products or in returning from farm to market delivery with an otherwise empty vehicle. As in the preceding judgments this proscription was conditioned upon subsequent authorization of the enjoined transportation by the I.C.C.

On January 24, 1968, prior to the challenged judgments, the I.C.C. filed notice of institution of administrative proceedings in relation to American Farm Lines and its identified employees. The notice purported to exclude from consideration, in the administrative hearings, the issues then before the trial court. I.C.C. briefs filed herein also proclaim this intent. The contemporaneous construction placed by the Commission upon the provisions of the I.C.C. Act are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous.[1]

Appellants challenge the jurisdiction of the court on the grounds that the acts complained of were not a clear and patent violation of the Interstate Commerce Act.

Jurisdiction in both actions is based upon 49 U.S.C. § 322

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[1] I.C.C. v. Weldon, 90 F. Supp. 873, 877 (W.D. Tenn. 1950), *aff'd per curiam*, 188 F.2d 367 (6th Cir.), *cert. denied*, 342 U.S. 827 (1951); *accord*, East Texas Motor Freight Lines, Inc., v. Frozen Food Express, 351 U.S. 49, 54 (1956).

(b)(2).[2] This statute gives the court jurisdiction over "clear and patent" violations of certain sections of the Interstate Commerce Act requiring certification or licensing of motor carriers.

49 U.S.C. § 303(b)(5)[3] is the provision in the I.C.C. code which excludes from regulation motor vehicles controlled and operated by cooperative associations.

The provisions applicable at the time of trial and the 1968 amendment to § 303(b)(5) each limit the application of the exemption to "a federation [possessing] no greater powers or purposes than cooperative associations so defined, . . ."

The definition of cooperative association is found in the Agricultural Marketing Act of June 15, 1929. The definition, now contained in 12 U.S.C. § 1141(j)(a), establishes that a cooperative association must be an association (1) "in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged . . ." (2) "That [is] operated for the mutual benefit of the members thereof as such producers

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[2] 49 U.S.C. § 322(b)(2) provides: "If any person operates in clear and patent violation of any provisions of section 303(c), 306, 309, or 311 [which require persons dealing in interstate commerce by motor vehicle to obtain a certificate or license] of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court . . . for the enforcement of such section, or of such rule, regulation, requirement, or order."

[3] 49 U.S.C. § 303(b) provides: "Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act. . . . "

or purchasers . . ." and (3) "[that] conform[s] to one or both of the following requirements:

> First: That no member . . . is allowed more than one vote . . . Second: That the association does not pay dividends . . . in excess of 8 per centum per annum. And in any case to the following: Third. That the association shall not deal in farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association."

Appellants rely heavily on the last sentence of the third requirement above set out and contend that this provision exempts them under 49 U.S.C. § 303(b)(5) as amended.

The "incidental and necessary" test recently adopted by this court[4] teaches "that the transportation activities of a cooperative must be incidental to its primary statutory activity and necessary to the effective performance of that activity."[5]

The primary statutory activity of producing and purchasing of farm products is set out in 12 U.S.C. § 1141(j)(a) above quoted. Section 1141(j)(a) also provides that cooperative associations must be operated for the mutual benefit of the members as such producers or purchasers. In addition, such associations must conform to the three requirements set out in § 1141(j)(a) including the requirement containing the provision relied upon by appellants.

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[4] I.C.C. v. Milk Producers Mkt. Co. 405 F.2d 639 (10th Cir. 1969). The "incidental and necessary" test was also made a part of 49 U.S.C. § 303(b)(5) by the 1968 amendment.

[5] *Id.* at 641.

These three requirements are not the primary statutory activities but are limitations. Therefore the incidental and necessary test as applied directs itself to an examination and conclusion of whether or not the exclusive carrying of explosives or other government property for the government is incidental and necessary to the defined activities of the cooperative.

The order of the trial court permits the transportation of government property for either an outbound or an inbound trip of a carrier when its farm to market or market to farm produce is carried on the other half of the trip.

We recognize the economic advantage to the appellant's transportation business by permitting the exclusive transportation of government property in both directions. However, we cannot find it described in the primary activities described in the provisions of the act.

Justification for the favored position of farm marketing cooperatives is based upon the necessity of making the cooperative efforts of the agrarian community competitive in the market place.[6] However, we have said, "back-to-back hauling of general commodities for nonmembers throughout the United States by motor vehicles on a for-hire basis . . . [is] not incidental to the [business of the cooperative.]"[7] Transportation of government commodities not incidental to the agrarian well-being cannot be said to be a primary activity of the cooperative.

We conclude, from a review of the record of the first proceeding, that no genuine issue as to any material fact

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[6] 12 U.S.C. § 1141(a) provides that it is the policy of Congress to place the industry of agriculture on a basis of economic equality with other industries.

[7] I.C.C. v. Milk Producers MKT. Co., 405 F.2d 639, 641-2 (10th Cir. 1969).

existed. Accordingly, the I.C.C. was entitled to a summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56(c).

The transportation proscribed by the trial court was not exempted under § 303(b)(5), therefore, the clear and patent violation of § 322(b)(2) is made evident by the above recited conclusion of this court. The trial court's conclusion of initial jurisdiction is therefore affirmed and its judgment and findings are affirmed.

APPENDIX E

Headquarters
Department of The Army
Office of The Judge Advocate General
Washington, D.C. 20310

EXHIBIT C

U 672
JAGU 1968/9695

30 April 1968

Mr. Howard McCormack
General Manager
American Farm Lines Co-op
Oklahoma City, OK 73107

Re: Application of American Farm Lines, Inc., to Transport General Commodities Including Class A and B Explosives

Dear Mr. McCormack:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I have been asked to reply to your request for the Department of Defense support in connection with your application before the Interstate Commerce Commission to transport general commodities, including Class A and B explosives.

The Department of Defense has used the services of American Farm Lines, Inc., to transport more than 1,200 shipments since December 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to

retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts.

Sincerely yours,

C. L. W.
CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

Mr. Wagner/svm/30 Apr 68